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No. 92-496

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In the Supreme Court of the United States

OCTOBER TERM, 1992

RENE GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the district court properly enhanced petitioner's base offense level under Sentencing Guidelines § 3C1.1 on the ground that he committed perjury at trial.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 3-31, is unreported, but the judgment is noted at 966 F.2d 676 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. The petition for a writ of certiorari was filed on September 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to possess more than 50 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 846, and on one count of possessing more than 50 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 72 months' imprisonment on each count, to be followed by concurrent terms of five years' supervised release. The court of appeals affirmed.[1]

1. On November 25, 1990, Louis Rocha, a United States Border Patrol Agent, was patrolling a road between Carrizo Springs and Eagle Pass, Texas. He noticed a white pickup truck stopped on the side of the road about 20 miles from Carrizo Springs. He saw a person, later identified as Jorge Garcia, walk away from the truck, heading in the direction of Carrizo Springs. Agent Rocha approached Garcia and asked if anything was wrong. Garcia replied that the truck had run out of gas. Rocha offered to drive Garcia to Carrizo Springs or to radio for assistance. Garcia declined, explaining that his brother and father were in Eagle Pass, but that he preferred not to contact his father for fear he would get angry. Garcia continued on foot in the direction of Carrizo Springs. Pet. App. 4-5; Gov't C.A. Br. 4-5.

Agent Rocha then returned to the truck. He pulled his car up next to the cab of the truck and saw that the window was rolled down and the door was unlocked. He saw

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[1] Petitioner's brother, Jorge Garcia, was tried with petitioner on the same charges, and he also was convicted on both counts.

binoculars and a zippered pouch on the seat, and a CB radio partially under the seat. Agent Rocha had to move his car to allow three other vehicles to pass. As soon as he pulled off the road behind the white pickup, he smelled a strong odor of marijuana. The cover of a tool box in the back of the truck was partially opened, and Agent Rocha could see plastic wrappings. He opened the cover and found approximately 220 pounds of marijuana. Pet. App. 5-6; Gov't C.A. Br. 5-6.

Agent Rocha drove back in the direction Jorge Garcia had been walking, but Garcia was now gone from view. Agent Rocha returned to the white truck and radioed to another agent, Robert Gonzalez, to look for the three vehicles that had passed him. Agent Rocha said Garcia was wearing a white cap, a blue shirt, and blue jeans, and had long salt-and-pepper hair pulled back in a pony tail. Pet. App. 6-7; Gov't C.A. Br. 7-8.

Sheriff's Deputy Ramon Saenz stopped one of the three vehicles described by Agent Rocha, a red truck, and asked to see the identification of the two men inside. Petitioner Rene Garcia was driving the truck, and Jorge Garcia was a passenger. Recognizing the passenger as fitting the description given by Agent Rocha, Saenz asked Jorge Garcia if he had just been picked up as a hitchhiker. Jorge Garcia said he had not. Petitioner and Jorge Garcia later told a Border Patrol officer that they were brothers and were driving to Crystal City, Texas, to find a mechanic, because their vehicle had broken down in Eagle Pass. Pet. App. 7-8; Gov't C.A. Br. 8-9. The brothers said that they were in the area to do some hunting. They could not say where they were going hunting, however, and they were not dressed for hunting. Pet. App. 8; Gov't C.A. Br. 9-10. Agent Rocha later arrived and identified Jorge Garcia as the man he had seen

with the white pickup truck. Pet. App. 8; Gov't C.A. Br. 10-11.

2. At trial, petitioner testified in his own defense. He stated that on the morning in question, he had made plans to go hunting in the Eagle Pass area. Petitioner said that his brother Jorge Garcia was going with him, although Jorge did not hunt. Petitioner said that he and his brother had decided to stop in Carrizo Springs to do some Christmas shopping. While they were looking for a particular store, a police officer stopped their truck and asked them questions. Petitioner denied ever telling the officers that they were going to Crystal City; he said the officers never asked him if he was going hunting; he said he had been with his brother continuously since that morning; and he said that Jorge was never near the white pickup truck. Gov't C.A. Br. 13-16.

3. The presentence report concluded that petitioner had testified falsely at trial and that his testimony therefore called for a two-level enhancement in his base offense level under Sentencing Guidelines § 3C1.1.[2] At the sentencing hearing, petitioner objected to the Section 3C1.1 enhancement. The district court rejected petitioner's objection, however, and increased his offense level by two points for obstruction of justice under Section 3C1.1. Sent. Tr. 7-8, 10, 16, 19-22; Pet. App. 19-20.

4. On appeal, petitioner argued that the sentence enhancement should be disallowed as unconstitutional, under the reasoning of the Fourth Circuit in *United States*

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[2] Sentencing Guidelines § 3C1.1 provides:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

v. *Dunnigan*, 944 F.2d 178 (1991), cert. granted, 112 S. Ct. 2272 (May 26, 1992) (No. 91-1300), which held that such an increase would act as an unconstitutional penalty for the defendant's exercise of his right to testify. The court of appeals rejected petitioner's argument, reaffirming its settled rule that a district court can enhance a defendant's base offense level for perjury under Sentencing Guidelines § 3C1.1. Pet. App. 21.

ARGUMENT

Petitioner claims that enhancing his sentence under Sentencing Guidelines § 3C1.1 on the ground that he committed perjury while testifying at trial unconstitutionally burdens a defendant's right to testify. He maintains that the decision below conflicts with the Fourth Circuit's decision in *United States* v. *Dunnigan*, *supra*. Pet. 8-14.

We agree with petitioner that a conflict among the circuits exists on this question. The eight other courts of appeals that have addressed this issue disagree with *Dunnigan*. They have held that the Constitution does not prohibit a judge from considering at sentencing the defendant's perjury at trial.[3] Since this question is pending before this Court in *Dunnigan*, we suggest that

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[3] See, *e.g.*, *United States* v. *Batista-Polanco*, 927 F.2d 14, 21-22 (1st Cir. 1991); *United States* v. *Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States* v. *Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), cert. denied, 493 U.S. 899 (1989); *United States* v. *Contreras*, 937 F.2d 1191, 1194-1196 (7th Cir. 1991); *United States* v. *Wagner*, 884 F.2d 1090, 1097-1099 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990); *United States* v. *Barbosa*, 906 F.2d 1366, 1369-1370 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990); *United States* v. *Beaulieu*, 900 F.2d 1537, 1538-1540 (10th Cir.), cert. denied, 497 U.S. 1009 (1990); *United States* v. *Wallace*, 904 F.2d 603, 604-605 (11th Cir. 1990).

the Court should hold the petition in this case pending its decision there.

We disagree, however, with petitioner's contention, Pet. 11-14, that the district court applied Sentencing Guidelines § 3C1.1 in a "wooden or reflexive" manner by enhancing his sentence simply because he testified and was convicted.[4] We agree with petitioner that a testifying defendant who is convicted does not, by that fact alone, "obstruct justice" under Sentencing Guidelines § 3C1.1. But the district court did not simply rely on the jury's guilty verdict as the basis for enhancing petitioner's sentence.

The presentence report recommended in favor of an enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1 on the ground that "[petitioner's] testimony constitute[d] materially false information" as to "the guilt or innocence of the [c]odefendant," Jorge Garcia, petitioner's brother. Presentence Report 6. The district court agreed with the probation officer's recommendation, and the court's finding is supported by the evidence. As the court of appeals noted, Agent Rocha positively identified Jorge Garcia as the person the agent saw walking away from the white truck, and other officers apprehended Jorge Garcia within a few minutes

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[4] Petitioner relies on *United States* v. *Seabolt*, 958 F.2d 231, 233-234 (8th Cir. 1992); *United States* v. *Corn*, 956 F.2d 135, 136 (7th Cir.), cert. denied, 112 S. Ct. 1574 (1992); *United States* v. *Ogbeifun*, 949 F.2d 1013, 1014-1015 (8th Cir. 1991); *United States* v. *Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991), petition for cert. pending, No. 91-6694 (filed Dec. 9, 1991); *United States* v. *Davis*, 938 F.2d 744, 747 (7th Cir. 1991); *United States* v. *Lozoya-Morales*, 931 F.2d 1216, 1218-1220 (7th Cir. 1991); *United States* v. *Husky*, 924 F.2d 223, 224-225 (11th Cir.), cert. denied, 112 S. Ct. 111 (1991); and *United States* v. *Martinez*, 922 F.2d 914 (1st Cir. 1991).

based on Agent Rocha's description of Jorge Garcia and the vehicles that passed by the agent. Petitioner's contradictory story that his brother had been with him the entire morning and that he had not picked up his brother on the road was "materially false information" within the meaning of Sentencing Guidelines § 3C1.1, because it was false and tended to exculpate petitioner's brother. The district court's finding that petitioner obstructed justice by giving material false testimony therefore rests on a finding by the court that petitioner gave false testimony, and not on the fact that the jury convicted petitioner at trial.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Dunnigan*, cert. granted, No. 91-1300, and then should be disposed of as appropriate in light of that decision.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

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